

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\*\*\*\*\*  
IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. ) FINAL ORDER  
20,682-s76H BY LARRY CAMPBELL )  
\*\*\*\*\*

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on March 15, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Order.

Exceptions to the Proposal for Decision were filed by the Applicant, Larry Campbell, with the Hearing Examiner. Those exceptions are addressed below:

EXCEPTIONS TO PROPOSED ORDER AND RESPONSES TO EXCEPTIONS:

1. Exception: The Applicant requests any amount of water for any period of time.

Response: The Proposed Order and Final Order must be based on the hearing record. At the hearing the Applicant stated that water was useful only if available for the entire period requested, which is from May 1 to September 30, inclusive, of each year. The Proposed Order cannot be altered by a change of testimony submitted after the record is closed.

2. Exception: The Applicant, the Objectors' witness and the Department Hydrologist all stated and were not challenged by anyone at the hearing that water on the surface on the Applicant's property becomes groundwater and thus not part of the source of supply.

Response: Only the Applicant made such a statement at the hearing, and this statement was challenged by the Objectors. The Objectors' witness did state that waters in the source of supply go underground,

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but that they then surface again. The Department's Hydrologist stated that Rye Creek is a gaining stream late in the season and a losing stream early in the season.

3. Exception: That the use of water for eating and drinking is beneficial.

Response: The Application was for irrigation purposes only, not domestic. Further, the Applicant testified that the water would be used for a garden. Garden crops require water throughout the irrigation season not just for a couple of months in the spring.

4. Exception: That the water could be used in January in a greenhouse.

Response: The Application is for May 1 to September 30 only. The period of appropriation cannot be extended without going through another public notice.

FINAL ORDER

Application for Beneficial Water Use Permit No. 20,682-s76H by Larry Campbell is hereby denied.

NOTICE

The Hearing Examiner's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 15th day of April, 1980.

*David L. Pengelly*  
DAVID L. PENGELLY, D.N.C. & C.  
HEARING EXAMINER

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BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\*\*\*\*\*  
IN THE MATTER OF APPLICATION FOR )  
BENEFICIAL WATER USE PERMIT NO. ) PROPOSAL FOR DECISION  
20,682-s76H BY LARRY CAMPBELL )  
\*\*\*\*\*

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on December 18, 1979, in the Courtroom of the Ravalli County Courthouse, Hamilton, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 20,682-s76H, David Pengelly, Hearing Examiner, presiding.

The Applicant, Larry Campbell, appeared at the hearing and presented testimony in support of the Application. Mr. Campbell was not represented by legal counsel. No exhibits were introduced supporting the Application.

Two Objectors attended the hearing and presented testimony or statements. The Objectors, Bob Recht and Roger Conner, were not represented by legal counsel. Bob Recht introduced one (1) exhibit supporting his objection, to wit:

OBJECTOR'S EXHIBIT:

O-1 Summary of Rye Creek Decree, Case No. 6281, August 1, 1935

The Objector's Exhibit was marked accordingly and received into the record without objections. Also present and testifying on behalf of the Objectors was Fred Thorning.

Montana Department of Natural Resources and Conservation personnel present and testifying on behalf of the Department were Larry Brown,

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1 Hydrologist; Arlin Krogstad, Hearing Representative; and Jan Mack,  
2 Missoula Water Rights Bureau Field Office Manager. Also present was  
3 Vicki Woodrow, Hearing Recorder. The Department was not represented by  
4 legal counsel. No exhibits were introduced by the Department.

5  
6 SUMMARY OF RECORD

7 1. On September 19, 1978, the Department received an Application for  
8 Beneficial Water Use Permit No. 20,862-s76H by Larry Campbell to appropriate  
9 10 gallons per minute of water, not to exceed 2.5 acre-feet per annum from  
10 Benson Creek, a tributary of Rye Creek in Ravalli County, Montana. The  
11 water is to be diverted from Benson Creek by means of a gravity-flow  
12 pipeline at a point in the NW1/4 NE1/4 NE1/4 of Section 33, Township 3  
13 North, Range 20 West, M.P.M., and used for new irrigation on a total of  
14 one (1) acre, more or less, in the NE1/4 of said Section 33, from May 1  
15 to September 30, inclusive, of each year.

16 2. On January 10, 17 and 24, 1979, the Department caused to be  
17 duly published in the Ravalli Daily Republic, Hamilton, Montana, notice  
18 of the above Application for Beneficial Water Use Permit No. 20,682-  
19 s76H.

20 3. On February 16, 1979, the Department received an objection to  
21 the above Application from Rober B. Conner.

22 4. On March 5, 1979, the Department received an untimely objection  
23 to the above Application from Robert F. Recht.

24 5. The Applicant, Larry Campbell, testified that he believes water  
25 from Benson Creek is available for appropriation on his property, even  
26 though Rye Creek may be dry further downstream. The Applicant stated  
27 that he believes water in the source of supply flows on the surface in  
28 the vicinity of his property and then goes underground and becomes

1 unavailable for downstream users; therefore, the Applicant believes that  
2 his appropriation of water would not adversely affect downstream users since  
3 the water would not be available for their use whether he takes it or not.  
4 Under cross-examination, the Applicant stated that he did not expect  
5 there would be much, if any, return flow to the source of supply from  
6 his irrigated lands if this permit were granted. The Applicant feels  
7 that he would only be applying enough water to meet the crop requirement  
8 and therefore there would be little, if any, return flow to the source of  
9 supply. The Applicant further stated that the flow in Benson Creek is  
10 fairly steady during the year, based on personal observation over the  
11 past three (3) years.

12 6. The Objector, Bob Recht, stated that he believes surface water  
13 and ground water along the source of supply are interconnected; if the  
14 Applicant removed surface water from Benson Creek then, further down on  
15 Rye Creek, surface water would have to go underground to maintain the  
16 equilibrium between the surface water and ground water, thus leaving less  
17 surface water downstream for use by prior appropriators. Mr. Recht  
18 stated that he has lived on Rye Creek since 1975, and during that period  
19 of time has had to adjust his irrigation program during periods of  
20 water shortages, which occur fairly often. Mr. Recht uses a traveling-  
21 gun sprinkler system with a capacity of 450 gallons per minute. Every  
22 year he has to either shut the system off or nozzle it down. At a diversion  
23 rate of 300 gallons per minute there are times when the Objector, Mr. Recht,  
24 is able to completely dry up Rye Creek. There are 632 miner's inches of  
25 decreed water listed on Rye Creek (Exhibit O-1) and the Objector does not  
26 feel that this volume of water is available except during high water in  
27 the spring. Mr. Recht has decreed rights for 292 miner's inches on Rye  
28 Creek and currently is using 165 miner's inches on Rye Creek.

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1           7. Fred Thorning, an observer, testified that he has lived and  
2 watched Rye Creek for 50 to 60 years and during that period has only  
3 observed approximately 5 years when there was sufficient water for  
4 flood irrigation of lands along Rye Creek. Mr. Thorning also testified  
5 that the high water period on Rye Creek generally lasts up to June,  
6 and usually drops off quite rapidly. Mr. Thorning does not feel that  
7 there are any unappropriated waters in Rye Creek except during high water in  
8 the spring.

9           8. Roger Conner, an Objector, testified that he was born and  
10 raised on the ranch he currently owns. Mr. Conner testified that during  
11 this period they've always had short water periods, and that the availability  
12 of water for Mr. Conner is dependent upon upstream users. Mr. Conner has  
13 the last point of diversion on Rye Creek. Mr. Conner feels that even  
14 small diversions upstream would adversely affect his prior right. Mr.  
15 Conner testified that occasionally during the late part of the irrigation  
16 season excess water does pass his point of diversion, but quite often this  
17 is because somebody up above him on Rye Creek has made a change in their  
18 system and allows an excess of water to run down the creek.

19 Mr. Conner irrigates approximately 100 acres with Rye Creek water. He can  
20 divert the entire flow of Rye Creek and does so quite often during the  
21 irrigation season.

22           9. Larry Brown, Department Hydrologist, testified that Benson Creek  
23 produces from 16 to 20 acre-feet per annum. Mr. Brown further testified  
24 that once Rye Creek leaves the mountains and spreads out into the Bitterroot  
25 Valley it gets into the Bitterroot River alluvium which has much larger  
26 pore spaces than the under ground material upstream and that it takes a  
27 lot of water to fill these pore spaces. Mr. Brown testified that Rye  
28 Creek is a gaining stream late in the season and a losing stream during  
the spring runoff period.

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10. Jan Mack, Missoula Water Rights Bureau Field Office Manager, testified that on September 25, 1979, Rye Creek was running into the Bitterroot River with Roger Conner's diversion ditch filled to capacity.

11. Bob Recht stated that it was probably not practical to give the Applicant a water right from the period of April 1 to May 30 since the Applicant would really need the water later in the summer once he got a crop planted. The Applicant, Larry Campbell, stated that the water would not be useful to him unless he could obtain a permit to use the water during the entire period for which he has applied for water.

PROPOSED FINDINGS OF FACT

1. That there are no unappropriated waters in the source of supply after the spring runoff.

2. That the appropriation of Benson Creek waters by the Applicant would adversely affect prior appropriators on Rye Creek.

3. That the Applicant cannot beneficially use the water if a Provisional Permit is granted for less than the period requested.

4. That the proposed use is a beneficial use.

5. That the proposed means of diversion or construction are adequate and the proposed use will not interfere with other planned uses or developments for which a permit has been issued or for which water has been reserved.

PROPOSED CONCLUSIONS OF LAW

1. Section 85-2-311, MCA, 1979, states that "The department shall issue a permit if:

1. there are unappropriated waters in the source of supply:

a. at times when the water can be put to the use

proposed by the applicant;

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1                   b. in the amount the applicant seeks to appropriate; and

2                   c. throughout the period during which the applicant

3                   seeks to appropriate, the amount requested is available;

4           2. the rights of a prior appropriator will not be adversely  
5           affected;

6           3. the proposed means of diversion or construction are adequate;

7           4. the proposed use of water is a beneficial use;

8           5. the proposed use will not interfere unreasonably with  
9           other planned uses or developments for which a permit has  
10          been issued or for which water has been reserved; . . ."

11           2. Based on the testimony presented at the hearing and information  
12          available in the Department's file on this matter, it is concluded that  
13          there are no unappropriated waters in the source of supply in the amount  
14          requested throughout the period during which the Applicant seeks to  
15          appropriate.

16           3. Based upon testimony presented at the hearing and information  
17          in the Department's file on this matter, it is concluded that the rights  
18          of prior appropriators would be adversely affected if this permit were  
19          granted.

20           4. Based upon testimony presented at the hearing and information  
21          present in the Department's file on this matter, it is concluded that  
22          the proposed means of diversion or construction are adequate; the proposed  
23          use of water is a beneficial use; and the proposed use will not interfere  
24          unreasonably with other planned uses or developments for which a permit  
25          has been issued or for which water has been reserved.

26           Based on the above Proposed Conclusions of Law, the following  
27          Proposed Order is hereby made:



PROPOSED ORDER

1. Application for Beneficial Water Use Permit No. 20,682-s76H by Larry Campbell is hereby denied.

NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the mailing of this Proposed Order and shall end fifteen (15) days thereafter. No extensions of time for comment shall be granted.

The Final Order in this matter shall be sent to all parties by certified mail.

The Hearing Examiner's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 15th day of March, 1980.

*David L. Pengelly*  
DAVID L. PENGELLY, D.N.R.&C.  
HEARING EXAMINER

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